Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

MADOLYN L. CRUMPTON,

Petitioner,

v.

MICHAEL P.W. STONE,
SECRETARY OF THE ARMY, AND
THE UNITED STATES OF AMERICA,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The District Of Columbia

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the United States absolutely immune from liability under the Federal Tort Claims Act when it improperly classifies information under the invasion of privacy exemptions to the Freedom Of Information Act (FOIA) and invades an individual's personal privacy by releasing extraordinarily private information about that individual to the public?

2. Does the discretionary function exception to the Federal Tort Claims Act bar claims based upon the improper classification of information under FOIA Exemptions 6 and 7(C), when the Government's classification of information is in direct violation of the precedent and directives of the Supreme Court of the United States regarding the interpretation and administration of the FOIA?

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PETITION FOR A WRIT OF CERTIORARI

Madolyn L. Crumpton petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-13a) is reported at 59 F.3d 1400. The opinion of the district court (App. 14a-29a) is reported at 843 F. Supp. 751.

JURISDICTION

The judgment of the court of appeals (App. 1a-13a) was entered on July 28, 1995. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied on October 4, 1995 (App. 30a-32a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent statutory provisions in this case are:

I. The Federal Tort Claims Act, 28 U.S.C. §§ 1346(b) and 2680(a).

Section 1346(b) provides in full:

> Subject to the provisions of chapter 171 of this title, the district courts, together with the

> United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Section 2680(a) provides that § 1346(b) shall not apply to:

> Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

II. The Freedom of Information Act, 5 U.S.C. §§ 552(b)(6) and (b)(7)(C).

Section 552's general disclosure provision is limited by:

> (b) This section does not apply to matters that are –
>
> * * *

(6) personnel and medical files and similar files disclosure of which would constitute a clearly unwarranted invasion of personal privacy;

(7) records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information

* * *

(C) could reasonably be expected to constitute an unwarranted invasion of personal privacy.

III. The Privacy Act, 5 U.S.C. § 552a(b):

Section 552a(b) provides:

(b) Conditions of disclosure. – No agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains, unless disclosure of the record would be

* * *

(2) required under section 552 of this title.

STATEMENT OF THE CASE

1. Factual Background.

This case arises out of requests under the Freedom Of Information Act (FOIA), 5 U.S.C. § 552, from several

newspaper reporters, all seeking information specifically concerning Petitioner Madolyn Crumpton's late husband, COL A.T. Crumpton, Jr. Without notice to or consent from Mrs. Crumpton, and without an order from any court, the Government released three separate reports concerning COL Crumpton to members of the press. All three reports specifically identified Mrs. Crumpton and contained private and personally identifying information about her. Two reports, which were unredacted except for social security numbers and home addresses, contained false and unsupported allegations that Mrs. Crumpton had engaged in fraud and other acts of wrongdoing. The third report contained intensely private information about Mrs. Crumpton and her family, including a detailed account of Mrs. Crumpton's efforts to rescue and revive her dead husband, as well as graphic descriptions of the photographs taken during the autopsy of COL Crumpton. Mrs. Crumpton learned that the Government had disclosed this information to the public when members of the press to whom the reports had been furnished contacted Mrs. Crumpton at her home in Texas and provided her with proof that the information had been released to them under the Freedom of Information Act.

2. The District Court Proceedings.

In November 1989, after complying with all administrative prerequisites, Mrs. Crumpton filed suit under the Federal Tort Claims Act (FTCA) asserting that the Government's unauthorized release of personally identifiable information about her under the Freedom of Information Act constituted an invasion of privacy and infliction of emotional distress as recognized under the laws of the

State of Texas. Mrs. Crumpton asserted that the Government had negligently released information about her that was exempt from mandatory release under FOIA Exemptions 6 and 7(C), and that the Government did not have the authority under the FOIA to invade the privacy of individuals by releasing personally identifiable information about them to the public.

After a four-day trial, the district court held that the Government had the authority to release personally identifiable information about Mrs. Crumpton to the press, and was immune from liability under § 2680(a) of the Federal Tort Claims Act for the release. The district court also held that the Government exercised both "due care" and "discretion" in releasing the information about Mrs. Crumpton to the press. (App. 27a-28a).

3. The Decision of the Court of Appeals.

The court of appeals affirmed (App. 10a-12a), holding that the "classification of information" by an agency bureaucrat under FOIA Exemptions 6 and 7(C) is a discretionary function under the FTCA, such that the Government is absolutely immune from liability whenever an agency classifies and releases information, even if the information is unrelated to the core purpose of the FOIA and serves no purpose but to invade the privacy of an individual citizen. The court so held despite acknowledging that the information released by the Government concerning Mrs. Crumpton was improperly classified and

that the resulting invasion of Mrs. Crumpton's privacy was unwarranted:

> Our conclusion does not mean that we condone the Army's decision to release the reports on Col. Crumpton or its classification of the released material as outside the scope of FOIA exemptions (6) and 7(C). Indeed, to us some of this material seems extraordinarily private, and we do not understand why the Army needed to release it to satisfy the public that it vigorously pursued allegations of fraud relating to one of its officers. (App. 12a-13a).[1]

Mrs. Crumpton challenged the court of appeals determination by filing a timely Petition for Rehearing and Suggestion for Rehearing En Banc. By Orders dated October 4, 1995, the court of appeals denied Mrs. Crumpton's petition. (App. 30a-32a). As a result of the decision below, the Government is immune from liability under the FTCA despite an agency's gross misclassification and release of extraordinarily private and personally indentifiable information in direct violation of this Court's decisions.

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[1] In fact on September 14, 1995, in response to Mrs. Crumpton's request, the court of appeals ordered sealed from public view portions of the court record which contain the very information previously released by the Government. (App. 33a-34a).

REASONS FOR GRANTING THE PETITION

The decision below directly conflicts with decisions of this Court, decisions of the District of Columbia Circuit, as well as the express will of Congress. The decision fundamentally changes the administration of the FOIA and the settled expectations of all citizens concerning their right to privacy, and creates confusion surrounding the proper role and authority of a government agency in responding to requests for information under the FOIA. An individual's right to privacy is now at the mercy of chance, without review from the courts or recourse for the harm done. Such uncertainty and confusion should not exist on so important and basic an issue as a citizen's right to privacy and the Government's duty to respect and protect that fundamental right.

In addition to the conflict and confusion created by the decision below, this important and recurring issue is independently worthy of review. Indeed, the decision below so significantly impairs the invasion of privacy Exemptions to the Freedom of Information Act as to render them meaningless. As a result, it is difficult to rationalize the holding with this Court's repeated pronouncements regarding the importance of an individual's right to privacy under the FOIA.[2] This Court should, therefore, grant the petition for a writ of certiorari.

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[2] "[I]t should come as no surprise that in none of our cases construing the FOIA have we found it appropriate to order a government agency to honor a FOIA request for information about a particular private citizen." *United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 774-75 (1989); *see e.g., C.I.A. v. Sims*, 471 U.S. 159 (1985); *F.B.I. v.*

I. The Decision Of The Court Of Appeals Is In Direct Conflict With This Court's Decisions Regarding The Releasability Of Personal, Private Information Under The Freedom Of Information Act.

On the fundamental question of whether personally identifiable information maintained in government files may be released pursuant to a FOIA request, the court of appeals' holding is in direct and irreconcilable conflict with the decisions of this Court in *Department of Air Force v. Rose*, 425 U.S. 352 (1976), and *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989).

In *Department of Air Force v. Rose*, 425 U.S. 352 (1976), an Exemption 6 case, this Court held that personally identifiable information should be withheld under Exemption 6 of the FOIA. In *Rose*, requesters sought access under the FOIA to summaries of Air Force Academy Honor and Ethics Code cases. Although personal references and other identifying information had been deleted from the summaries, this Court nevertheless directed that if the disciplinary records sought could not be adequately redacted to protect the identity of the disciplined cadets, the records should not be released. *Id.* at 381.

In *United States Department of Justice v. Reporters Committee for Freedom of the Press*, 489 U.S. 749 (1989), an

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Abramson, 465 U.S. 615 (1982); *United States Dep't of State v. Washington Post Co.*, 456 U.S. 595 (1982); *Department of Air Force v. Rose*, 425 U.S. 352 (1976).

Exemption 7(C) case, the question before this Court was whether the disclosure of the contents of an individual's FBI rap sheets to a third party "could reasonably be expected to constitute an unwarranted invasion of personal privacy" within the meaning of the FOIA, 5 U.S.C. § 552(b)(7)(C). *Id.* at 751. Recognizing that "both the common law and the literal understandings of privacy encompass the individual's control of information concerning his or her person," this Court held that " . . . disclosure of records regarding private citizens, identifiable by name, is not what the framers of the FOIA had in mind." *Id.* at 763. The Court explained:

> This basic policy of " 'full agency disclosure unless information is exempted under clearly delineated statutory language,' " *Department of Air Force v. Rose*, 425 U.S. *at* 360-61 (quoting S. Rep. No. 813, 89th Cong., 1st Sess., 3 (1965)), indeed focuses on the citizens' right to be informed about "what their government is up to." Official information that sheds light on an agency's performance of its statutory duties falls squarely within that statutory purpose. That purpose, however, is not fostered by disclosure of information about private citizens that is accumulated in various governmental files but that reveals little or nothing about an agency's own conduct. In this case – and presumably in the typical case in which one private citizen is seeking information about another – the requester does not intend to discover anything about the conduct of the agency that has possession of the requested records. Indeed, response to this request would not shed any light on the conduct of any Government agency or official.

Id. This Court emphasized in *Reporters Committee* that the refusal to provide information on identifiable private individuals created no conflict with the FOIA's overall disclosure policies. "[T]he FOIA's central purpose is to ensure that the Government's activities be open to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed." *Id.* at 774. Because disclosure of private information in government files, such as the information concerning Mrs. Crumpton, reveals nothing directly about the conduct of the Government, this Court has consistently rebuffed all efforts to secure such information.

After *Rose* and *Reporters Committee*, there can be no doubt that agencies do not have the unreviewable authority to release personally identifiable information about individuals such as Mrs. Crumpton to the public. The decision of the court of appeals, however, is in direct conflict with this Court's decisions, and misinterprets the FOIA as giving the agency not merely the responsibility of determining what information is personally identifiable under Exemptions 6 and 7(C), but, also, the authority to actually release personally identifiable and extraordinarily private information about an individual to the public if the agency simply chooses to do so.

The peril to all citizens as a result of the decision below is squarely presented in this case and with this petitioner. If the decision of the court of appeals is allowed to stand, the privacy protections Congress afforded individuals under the FOIA will exist only at the whim of the agency bureaucrat assigned the task of reviewing the information. Important privacy interests

will be rendered meaningless as government agencies arbitrarily determine when to invade an individual's privacy. Because of the disastrous ramifications of the decision below on the value of personal privacy, certiorari should be granted.

II. The Court Of Appeals' Interpretation Of FOIA Exemptions 6 And 7(C) Conflicts With The Express Will Of Congress And With Previous Decisions Of The District Of Columbia Circuit.

Exemptions 6 and 7(C) are unique among the FOIA's nine Exemptions because they were designed to protect the privacy interests of individuals about whom information is contained in government files. There is no language in the FOIA that bestows upon an agency the authority to determine that the violation of an individual's right to privacy under the Act is "warranted." Congress assigned that duty to the courts. Thus, if the information being requested crosses the threshold of FOIA Exemption 6 or 7(C) (i.e., it is personally identifiable), the agency is without authority under the FOIA to release that information. The requester may then seek a release determination in the district court, and the court, not the agency itself, can determine whether the release of the information would constitute an unwarranted invasion of personal privacy by balancing the public interest in disclosure against the individual's right to privacy. The FOIA does not contemplate government agencies making such determinations, nor does it authorize agencies to engage in such conduct. Instead, as this

Court has expressly recognized, the FOIA contemplates that:

> When disclosure of information which applies to a particular individual is *sought* from Government records, *courts* must determine whether release of the information would constitute a clearly unwarranted invasion of that person's privacy.

United States Dep't of State v. Washington Post Co., 456 U.S. 595, 602 (1982) (emphasis added).

In this case, because the agency was acting beyond its authority in determining that the release of "extraordinarily private" information concerning Mrs. Crumpton was "warranted", its actions are not discretionary nor are they shielded by the discretionary function exception to the FTCA:

> Government decisions which do not involve discretion to make or implement policy . . . may give rise to a tort claim, even if those decisions require the exercise of other forms of discretion . . . A government official has no discretion to violate the binding laws, regulations, or policies that define the extent of his official powers. An employee of the government acting beyond his authority is not exercising the sort of discretion the discretionary function exception was enacted to protect.

Red Lake Band of Chippewa Indians v. United States, 800 F.2d 1187, 1196 (D.C. Cir. 1986).

Despite these clear pronouncements, the court of appeals simply accepted the Government's bald assertion that in "classifying information", government agencies

have the authority to go beyond the threshold determination of whether information is personally identifiable, and may balance the public interest in disclosure of the personally identifiable information against the individual's right to privacy. According to the court below, the agency may then release the information even if it determines that it is exempt from disclosure. (App. 6a).[3] The court's decision bestows upon government bureaucrats authority superior to that of a federal district court. While a court must adhere to the law, and its decisions are reviewable by this Court, agency employees, according to the court below, are not required to follow any guidelines.[4] The decision below cannot stand.

The decision below also conflicts with previous decisions of the District of Columbia Circuit regarding the disclosure of information under Exemptions 6 and 7(C). *See, e.g., McCutchen v. United States Dep't of Health and*

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[3] The court of appeals decision that agencies may release materials that Congress has exempted from release under the FOIA is based upon a misinterpretation of this Court's holding in *Chrysler Corp. v. Brown*, 441 U.S. 281 (1979). In *Chrysler*, this Court held that "Since materials that are exempt from disclosure under the FOIA are by virtue of Part II of this opinion outside the ambit of that Act, the Government cannot rely on the FOIA as congressional authorization for disclosure regulations that permit the release of information within the Act's nine exemptions." *Id.* at 303-304.

[4] Assuming arguendo, that federal civil servants are to be entrusted to perform the same duties as the district courts in determining releasability of personally identifiable information, then such agency assessments should be based upon criteria identical to that used by the courts.

Human Services, 30 F.3d 183 (D.C. Cir. 1994); *SafeCard Services, Inc. v. Securities and Exchange Commission*, 926 F.2d 1197 (D.C. Cir. 1991); *National Ass'n of Retired Federal Emp. v. Horner*, 879 F.2d 873 (D.C. Cir. 1989), *cert. denied sub nom., NARFE v. Newman*, 110 S.Ct. 1805 (1990); *Carter v. United States Dep't of Commerce*, 830 F.2d 388 (D.C. Cir. 1987); *King v. United States Dep't of Justice*, 830 F.2d 210 (D.C. Cir. 1987); *Bast v. Dep't of Justice*, 665 F.2d 1251 (D.C. Cir. 1981); *Fund for Constitutional Government v. National Archives and Records Service*, 656 F.2d 856 (D.C. Cir. 1981); *Baez v. United States Dep't of Justice*, 647 F.2d 1328 (D.C. Cir. 1980). The decision represents a dramatic departure from the court of appeals' previous position that the appropriate level of deference to be given to an agency's particular classification decision under FOIA was "none." *Association of Retired Railroad Workers, Inc. v. United States Railroad Retirement Board*, 830 F.2d 331, 333 (D.C. Cir 1987). "[N]o single agency is entrusted with FOIA's primary interpretation" because "Congress intended that the primary interpretive responsibilities rest on the judiciary, whose institutional interests are not in conflict with [those] statutory purpose[s]." *Id.*

By holding that the discretionary function exception to the Federal Tort Claims Act applies to the classification of information under the Freedom of Information Act, the court of appeals has ignored not only the unique place that Exemptions 6 and 7(C) hold in the statutory scheme, but the Congressional mandate which they represent.[5]

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[5] In addition to its impact upon the FOIA, the court's decision has a dramatic impact upon the efficacy of the Privacy Act,

The court has altered the very nature of the classification decision under FOIA and has created new and conflicting law. If this opinion is allowed to stand and is carried to its logical conclusion, the federal government will, as one former District of Columbia Circuit judge warned, "be transformed in one fell swoop into the clearinghouse for highly personal information, releasing records on any person to any requester, for any purpose . . . ." *Reporters Committee for Freedom of the Press v. United States Dep't of Justice*, 831 F.2d 1124, 1130 (D.C. Cir. 1987) (en banc), *rev'd*, 489 U.S. 749 (1989). Such a result will not only have "a pernicious effect on personal privacy interests" but will also conflict with Congress' express will. *Id.*

Any decision severely infringing upon a citizen's fundamental right to privacy and undermining the societal interest and goals that Congress attempted to foster in drafting the exemptions to the FOIA is of inherent importance to all citizens. The holding of the court of appeals here is such a decision. This Court should, therefore, grant the petition for a writ of certiorari.

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5 U.S.C. § 552a(b)(2). In *United States Dep't of Defense v. F.L.R.A.*, 114 S.Ct. 1006, 1014 (1994), this Court held that the non-disclosure portion of the Privacy Act prohibits the release of private information unless the release is "required" by the FOIA. Affording agencies the absolute discretion to determine that invasions of privacy are "warranted" and thus "required" under the FOIA, renders the non-disclosure portion of the Privacy Act meaningless.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

MADOLYN L. CRUMPTON, APPELLANT

v.

MICHAEL P.W. STONE,
SECRETARY OF THE ARMY, ET AL., APPELLEES

No. 94-5056

UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

59 F.3d 1400; 1995 U.S. App. LEXIS 19975

March 6, 1995, Argued
July 28, 1995, Decided

PRIOR HISTORY: Appeal from the United States District Court for the District of Columbia. (No. 89cv03128).

COUNSEL: Brent L. Crumpton argued the cause for appellant. With him on the briefs was Charles S. Mitchell.

Edith S. Marshall, Assistant United States Attorney, argued the cause for appellees. With her on the brief were Eric H. Holder, Jr., United States Attorney and R. Craig Lawrence, Assistant United States Attorney. John D. Bates, Assistant United States Attorney, entered an appearance for appellee.

JUDGES: Before: SENTELLE, HENDERSON and TATEL, Circuit Judges. Opinion of the court filed by Circuit Judge TATEL.

OPINION BY: TATEL

OPINION: TATEL, Circuit Judge: In this case we must decide whether Madolyn L. Crumpton can sue the Department of the Army under the Federal Tort Claims Act for releasing records that allegedly caused her great

embarrassment and emotional distress. Because no "federal statute, regulation, or policy specifically [proscribes]" the release of this information in response to a Freedom of Information Act request, and because the discretion exercised by the Army in evaluating the FOIA request is of the "nature and quality that Congress intended to shield from tort liability," *Cope v. Scott*, 310 U.S. App. D.C. 144, 45 F.3d 445, 448 (D.C. Cir. 1995), we agree with the district court that the discretionary function exemption to the FTCA prevented it from taking jurisdiction over this case.

I.

Nearly ten years ago, the Army Inspector General, and then the Army Criminal Investigations Division, conducted an investigation into allegations that Col. Alfred T. Crumpton had padded his travel expense reports and that he had accepted gratuities while stationed in England as commander of an Army Standardization Group. Near the close of that investigation, after the Army had reassigned the Crumptons to New Jersey, Col. Crumpton committed suicide, an event into which the CID conducted another investigation. The reports of these investigations, known as "Reports of Inquiry" or "Reports of Investigation" (ROIs), included information regarding Mrs. Crumpton and her family. Neither investigation led to criminal charges.

In response to FOIA requests for the ROIs by New Jersey newspapers, the Army concluded that the reports were not, as a whole, likely to lead to an "unwarranted invasion of personal privacy." *See* 5 U.S.C. § 552(b)(6) &

(7)(C) (1988) (exempting certain information from mandatory release under the Freedom of Information Act). It thus released the reports, although it redacted certain portions because of privacy concerns. Mrs. Crumpton claims that even more of the information should have been withheld because the Army knew its release would cause an "unwarranted invasion of personal privacy" by revealing to the public both false and intimate information about her and her family. The portions of the ROI of fraud that the Army released, for example, included reports of allegations linking Mrs. Crumpton to the alleged fraud as well as statements she made to investigators. The ROI of death included details regarding the Crumpton family's discovery of, and immediate reaction to, Col. Crumpton's suicide.

Seeking relief under the Federal Tort Claims Act, Mrs. Crumpton initiated administrative proceedings, arguing that the release of the ROIs invaded her personal privacy and caused her significant emotional distress. After the Army rejected her claim, she sued. Following a four-day trial, the district court ruled that it had no jurisdiction under the FTCA and dismissed the case. Mrs. Crumpton appeals.

II.

The FTCA waives the government's immunity in suits "for money damages . . . for . . . personal injury . . . caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. § 1346(b) (1988). The Act contains two exceptions that are

at the heart of this dispute. The "due care" exemption excludes from district court jurisdiction "any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid." 28 U.S.C. § 2680(a) (1988). The "discretionary function" exemption bars district court jurisdiction over claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." *Id.*

The district court concluded that both exemptions applied, i.e. that Army officials had exercised "due care" in determining that the requested information was not exempt, and that the decision involved in that determination was an exercise of a "discretionary function" that the FTCA exempts from judicial review. *See Crumpton v. United States*, 843 F. Supp. 751, 756-57 (D.D.C. 1994). To the extent that it rests on interpretations of law, we review the district court's decision de novo, *see Cope*, 45 F.3d at 450, accepting its factual findings unless clearly erroneous. *See Herbert v. National Academy of Sciences*, 297 U.S. App. D.C. 406, 974 F.2d 192, 198 (D.C. Cir. 1992).

Our jurisdictional analysis begins with the two-part test the Supreme Court uses to determine whether the discretionary function clause of section 2680(a) applies to the facts of a case. First, we ask whether a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow." *United States v. Gaubert*, 499 U.S. 315, 322, 113 L. Ed. 2d 335, 111 S. Ct. 1267 (1991) (quoting *Berkovitz v. United States*, 486 U.S.

531, 536, 100 L. Ed. 2d 531, 108 S. Ct. 1954 (1988)). If so, then the "due care" clause applies and the government is exempt from suit as long as the employee has exercised due care in following the dictates of the statute or regulation. If there is no specific prescription, then some choice is involved in the employee's action, and we move to the second step, under which we must determine whether that choice qualifies as a discretionary function under the FTCA. If the discretion exercised by the agency involves "political, social, or economic judgments," *Cope*, 45 F.3d at 448 (internal punctuation and citation omitted), it is the type of decision that is of "the nature and quality that Congress intended to shield from tort liability" through the discretionary function exemption. *United States v. Varig Airlines*, 467 U.S. 797, 813, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984); *see also Cope*, 45 F.3d at 448-50. In assessing the "discretionary" nature of the decision, we look not to what the decisionmaker in a particular case was thinking, but to "whether the type of decision being challenged" implicates policy judgments. *See Cope*, 45 F.3d at 449 (emphasis added).

Mrs. Crumpton argues that the Army's decision to release the information about her husband was specifically proscribed by FOIA, Army regulations, and the Privacy Act, 5 U.S.C. § 552a(b) (1988 & Supp. V 1993). We disagree, concluding in section III that no statute or regulation, standing alone, specifically limits the Army's discretion. Mrs. Crumpton further argues that any discretion that the Army did have was not the type of discretion that Congress intended to shield from tort liability. We address this argument in section IV, concluding, as did the district court, that the Army's discretion was not of

the "nature and quality" that Congress intended to subject to tort liability.

III.

We begin with the Freedom of Information Act, the first of the three authorities that Mrs. Crumpton claims limited the Army's discretion to release the reports on her husband. Under FOIA, an agency "shall" make available to any person records that the person "reasonably describes" in a request to the agency "in accordance with published rules" governing such requests. 5 U.S.C. § 552(a)(3) (1988). An agency is excused from this requirement only with respect to materials that fall within one of FOIA's nine specific exemptions. *See* § 552(b)(1)-(9). If the agency determines that the information is not exempt, it must release it. If an exemption applies, the agency may withhold the information, although FOIA itself does not require an agency to do so. As this court stated almost two decades ago, "the exemptions to the FOIA are permissive rather than mandatory." *Mead Data Central, Inc. v. United States Dept. of the Air Force*, 184 U.S. App. D.C. 350, 566 F.2d 242, 258 (D.C. Cir. 1977); *see also Chrysler Corp. v. Brown*, 441 U.S. 281, 293, 60 L. Ed. 2d 208, 99 S. Ct. 1705 (1979) ("Congress did not design the FOIA exemptions to be mandatory bars to disclosure."); *Mobil Oil Corp. v. EPA*, 879 F.2d 698, 700 (9th Cir. 1989) ("The exemptions are permissive, and an agency may voluntarily release information that it would be permitted to withhold under the FOIA exemptions."). Enacted to encourage the disclosure and limit the withholding of government-held records, FOIA allows an agency to withhold information in certain

circumstances, but it "[does] not limit an agency's discretion to disclose information." *Chrysler*, 441 U.S. at 294. FOIA, therefore, does not "specifically prescribe" an agency's decision to release information pursuant to a FOIA request. *See Gaubert*, 499 U.S. at 322.

Mrs. Crumpton argues that even if FOIA leaves agencies with discretion to release information, Army regulations limited that discretion. She claims, for example, that section 5-101 of the Army's general FOIA regulations sets forth the only conditions under which certain types of records may be released pursuant to FOIA requests. See Release of Information and Records from Army Files, Army Reg. No. 340-17 (Oct. 1, 1982), in Joint Appendix (J.A.) I at 234, 262 (codified at 32 C.F.R. § 518.14(b) (1986)). We do not read that section so broadly. Section 5-101(b) merely outlines those instances in which personnel records "will" be released. *Id.*, in J.A. I at 262 (codified at 32 C.F.R. § 518.14(b)(2)). It does not limit the Army's discretion to release information in other instances when it concludes, after subjecting requests to the standard FOIA review process, that release is either necessary or appropriate. It is true that section 5-101(d)(2) states that certain information about criminal investigations will be released "only" in certain circumstances. *Id.*, in J.A. I at 262 (codified at 32 C.F.R. § 518.14(b)(4)(ii)). That section, however, explicitly addresses the rights of the accused "before the determination of the case;" it does not create a general privacy right for those referred to in the records. *Id.* at § 5-101(d), in J.A. I at 262 (codified at 32 C.F.R. § 518.14(b)(4)). After Col. Crumpton's death and

the close of the investigation, therefore, any restriction this section placed on release was no longer controlling.

Mrs. Crumpton points to an Army pamphlet entitled "A Guide for the Survivors of Deceased Army Members," arguing that it established an Army policy that precluded the release of portions of the reports on her husband. According to the pamphlet, "Out of respect for the privacy of the [primary next of kin,] the Report of Investigation is not released to other family members without the written consent of the [primary next of kin.]" Government Brief at 23 (quoting Department of the Army Pamphlet 608-4). We do not think that this pamphlet, which was apparently drafted by the Army's "Casualty Affairs" office as a guide to the Army's relationship with a deceased's family, is a definitive statement of Army policy with respect to the Army's treatment of third-party requests for information under FOIA. We can find no evidence that the Army used this pamphlet as a guide for evaluating FOIA requests. Indeed, according to testimony in the district court, the Criminal Investigations Division told the Casualty Affairs office that the pamphlet appears to be "an absolute guide on everything and it is not." See Transcript at 79, *Crumpton v. Stone*, No. 89cv3128 (D.D.C. June 15, 1993) (testimony of Jeffrey Porter, CID employee), in J.A. I at 133.

Nor are we persuaded, as Mrs. Crumpton argues, that Army Regulation 195-2, which governs the Army's criminal investigation activities, limits the release of information from investigative files except in limited cases that are not present here. *See, e.g.*, Criminal Investigation Activities, Army Reg. No. 195-2, § 3-14(d) (Oct. 30,

1985), in J.A. I at 304, 310 (stating, in section on "Coordination," that "derogatory information that mentions or can be tied to particular individuals will be released only to those persons whose official duties create a definite need to have access to the information"). Only section 4-3(j) of this regulation addresses the release of material in the context of a media request, and that section is procedural only, allowing requests for CID investigative information "not resolved at the investigating element's level [to] be directed to the Commander [of the CID]." *Id.*, § 4-3(k), in J.A. I at 314. This procedure was apparently followed in this case. The request for release was, according to the district court, reviewed by the Staff Judge Advocate for the CID, "technical advisor to the commanding general," who then applied the Army's general regulations governing FOIA requests. *See Crumpton*, 843 F. Supp. at 756. Because Army Regulation 195-2 simply refers FOIA requests to the CID for further FOIA processing, it does not independently limit the Army's discretion to release information.

Mrs. Crumpton argues, finally, that even if Army regulations did not specifically limit the Army's discretion to release the reports on her husband, the Privacy Act did. According to subsection (b) of that statute, "No agency shall disclose any record which is contained in a system of records by any means of communication . . . except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains." 5 U.S.C. § 552a(b). Subsection (b)(2), however, explicitly permits an agency to disclose information if its disclosure is "required under [FOIA]." § 552a(b)(2). That language, this court concluded in 1982, "represents a

Congressional mandate that the Privacy Act not be used as a barrier to FOIA access." *Greentree v. United States Customs Service*, 218 U.S. App. D.C. 231, 674 F.2d 74, 79 (D.C. Cir. 1982). Two years later Congress incorporated that holding into the Privacy Act by adding subsection (t)(2), which states that "No agency shall rely on any exemption in [the Privacy Act] to withhold from an individual any record which is otherwise accessible to such individual under the provisions of [FOIA]." 5 U.S.C. § 552a(t)(2) (1988). The Privacy Act, therefore, does not specifically limit the agency's discretion to withhold records unless those records are exempt from release under FOIA. Since the Army released the records relating to Col. Crumpton because it decided that they were not exempt under FOIA, however, Mrs. Crumpton can maintain an FTCA suit only if she can challenge the Army's decision that the information that allegedly injured her was not exempt. And since no statutes or regulations specifically required the Army to classify this material as exempt, district court jurisdiction over the classification depends solely upon whether it is a "discretionary function" under the FTCA. It is to that issue that we now turn.

IV.

To determine whether a classification decision is a "discretionary function" under section 2680(a), we need not go much beyond the language of exemptions (6) and (7)(C). Those exemptions allow agencies to withhold information if its release would constitute an "unwarranted invasion of personal privacy," *see* 5 U.S.C. § 552(b)(6) & (7)(C), and require agencies to balance the public's interest in disclosure against the private interest

in withholding. *Department of the Air Force v. Rose*, 425 U.S. 352, 373, 48 L. Ed. 2d 11, 96 S. Ct. 1592 (1976). Balancing the societal concern for personal privacy against the "basic policy" of the act – "disclosure, not secrecy," *see Id.* at 361 – is "fraught with . . . public policy considerations" that necessarily involve the exercise of "political, social, and economic judgment," *Sami v. United States*, 199 U.S. App. D.C. 173, 617 F.2d 755, 767 (D.C. Cir. 1979); *Varig*, 467 U.S. at 820; *see also Cope*, 45 F.3d at 448-49. It is, therefore, a quintessential discretionary function, " 'of the nature and quality that Congress intended to shield from tort liability' " and thus exempt from suit under the FTCA. *Cope*, 45 F.3d at 448 (quoting *Varig*, 467 U.S. at 813).

Mrs. Crumpton argues that because FOIA requires courts to review agency decisions to withhold information de novo, see 5 U.S.C. § 552(a)(4)(B), all agency decisions classifying information under the statute – whether exempt or not – are subject to judicial second-guessing in tort. We cannot agree. Although Congress has allowed courts to review de novo an agency decision to classify information as exempt, courts conduct that review only under limited circumstances, and such review is always conducted in light of FOIA's " 'general philosophy of full agency disclosure,' " *Rose*, 425 U.S. at 360 (citing legislative history). FOIA's carefully circumscribed judicial review provision does not change the nature of the agency's classification decision; it continues to "implicate[ ] social . . . [and] political policies," *Gaubert*, 499 U.S. at 332, and is therefore a discretionary function exempt from suit under the FTCA.

In contrast to FOIA's judicial review provisions, which are intended to ensure that FOIA accomplishes its purpose of changing public disclosure law from a "withholding statute [to] a disclosure statute," *EPA v. Mink*, 410 U.S. 73, 79, 93 S. Ct. 827, 35 L. Ed. 2d 119 (1973), allowing courts to second-guess in tort the political and social judgments involved in classifying records under the act would encourage agencies to withhold information, thereby completely undermining FOIA's "general philosophy" favoring release. The Privacy Act already provides some measure of deterrence to "intentional or willful" agency decisions to release information that could be considered exempt under the act, *see* 5 U.S.C. § 552a(g)(4) (1988), but an agency liable under the FTCA for making a merely negligent decision to release information would have a significant incentive to withhold information whenever it had any question about whether the information fell within one of FOIA's exemptions. Agencies would have little incentive to exercise the political and social judgment that they retain under FOIA because courts could always second-guess – and even impose damages for – their decision to release non-exempt information. Because Congress intended the discretionary function clause of 28 U.S.C. § 2680(a) to prevent this very type of judicial second-guessing of agency discretion, we conclude that Mrs. Crumpton cannot maintain her FTCA suit against the Army.

V.

Our conclusion does not mean that we condone the Army's decision to release the reports on Col. Crumpton or its classification of the released material as outside the

scope of FOIA exemptions (6) and 7(C). Indeed, to us some of this material seems extraordinarily private, and we do not understand why the Army needed to release it to satisfy the public that it vigorously pursued allegations of fraud relating to one of its officers. Nevertheless, we conclude that Mrs. Crumpton cannot maintain an FTCA suit against the Army because Congress has not authorized courts to "second-guess" in tort an agency's decision to release information that it believes it may – or must – release under FOIA. Finding that Mrs. Crumpton's remaining arguments are without merit, we affirm the decision of the district court.

So ordered.

APPENDIX B

MADOLYN L. CRUMPTON, Plaintiff,

v.

UNITED STATES OF AMERICA, Defendant.

Civil Action No. 89-3128

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

843 F. Supp. 751; 1994 U.S. Dist. LEXIS 1569

February 14, 1994, Decided
February 14, 1994, Filed

COUNSEL: For Plaintiff: Charles S. Mitchell, Esq., Fairfax, Virginia.

For Defendant: Edith S. Marshall, Assistant U.S. Attorney, Wash., D.C..

JUDGES: PRATT

OPINION BY: JOHN H. PRATT

OPINION: FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above action was tried to the Court on the issue of liability alone from June 14, 1993 through June 18, 1993. After the transcript of the trial was made available to counsel, proposed findings of fact and conclusions of law were submitted by the parties on December 6, 1993. After full consideration of these proposals and with full access to the transcript of the trial, the Court adopts the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. This is a case brought under the Federal Tort Claims Act, by the plaintiff Madolyn L. Crumpton. She is the widow of Colonel Alfred T. Crumpton who died by suicide on January 29, 1986 at the Picatinny Arsenal in New Jersey. Crumpton was a career Army officer of 23 years service.

2. Plaintiff's suit is for the infliction of intentional and negligent distress allegedly suffered by plaintiff from the defendant's release pursuant to requests under the Freedom of Information Act (FOIA) of certain information concerning the allegedly illegal activities of the deceased Crumpton during the years 1984 and 1985, when he was stationed in the United Kingdom (UK).

3. After Colonel Crumpton's death, plaintiff returned and resumed her domicile in the State of Texas.

4. Plaintiff complains of three distinct reports which were released to the press after her return to Texas.

A. The AMC Report of Investigation (ROI)

5. Sometime prior to May 9, 1985 (some eight months after the Crumptons had departed the UK) allegations that Col. Crumpton had engaged in certain violations of travel regulations and in the improper receipt of gratuities were orally transmitted to Major General Carl McNair, then Army Deputy Chief of Staff for Combat Development, Training and Doctrine Command in the UK. Pursuant to the advice of his staff Judge Advocate, McNair instructed his Inspector General to forward the allegations to the Inspector General of the Army Material

Command (AMC-OIG), the immediate major command authority of Col. Crumpton. Col. Robert Barrett, a member of the AMC Inspector General's Office, was assigned to conduct an inquiry concerning these allegations.

6. To this end, interviews were conducted of persons located in both the UK and the United States (US).

7. The basic allegations which were the subject of the AMCOIG inquiry were:

a. That Col. Crumpton had accepted a pleasure trip from a contractor while Commander of the U.S. Army Research, Development and Standardization Group in London, UK.

b. That Col. Crumpton's wife had accepted an oil painting as a gift from a contractor.

c. That Col. Crumpton had "padded" his local travel vouchers to make up for money spent on entertaining.

8. Col. Crumpton was the sole object of Barrett's AMC-OIG inquiry.

9. Because AMC-OIG's office lacked the authority to investigate criminal activities, the AMC report and interview notes were furnished to the Army Criminal Investigation Division (CID) for use by that authority in its investigation into possible criminal activity by Col. Crumpton.

B. The Two CID Reports of Investigation (ROIs)

10. Upon referral by the AMC-IG's office, the Army CID conducted a criminal investigation into the allegations concerning Col. Crumpton's activities. CID Agent

Sidney Younger had primary responsibility for the conduct of this investigation. A separate investigation was also conducted in the details and circumstances of Col. Crumpton's death.

11. Plaintiff, Madolyn L. Crumpton, was not the subject of any investigation by the CID, nor a "suspect" under criminal investigation. Her activities were inquired into only insofar as those activities related to allegations of possible misconduct on the part of her husband. Since the plaintiff, a civilian, did not fall within the scope of the Uniform Code of Military Justice or of Army Regulation 600-50, it was not within CID's jurisdiction to conduct an investigation of her. With respect to the allegation of plaintiff's conduct concerning the receipt of gratuities from contractors, plaintiff's conduct was relevant only to a determination of whether Col. Crumpton might have violated standards of conduct applicable to himself.

12. On December 10, 1985, CID Agent Younger, with CID Agent Charles Humphrey also in attendance, interviewed both Col. Crumpton and the plaintiff at the Picatinny Arsenal, New Jersey. In conjunction with these interviews, Agent Younger prepared, and both Col. Crumpton and plaintiff executed sworn statements reflecting what Younger regarded as the substance of their respective interviews. These sworn statements were not a verbatim account of the interviews, nor did they reflect the entire substance of everything that was said. At the end of her interview, plaintiff read the statement Younger had prepared and was given an opportunity to add to or correct the statement. Thereafter, she signed the statement Younger had prepared. Col. Crumpton was given a similar opportunity with respect to his statement.

13. In his statement of December 10, 1985, Col. Crumpton admitted that he had "invented" a TDY (Temporary Duty) trip to Houston for the purpose of defraying the cost of travel related to arrangements for his father's funeral. He also stated he had made "mistakes" on certain travel vouchers submitted to the government for payment.

14. After December 10, 1985, the date of his interview with Agent Younger, Col. Crumpton wrote his commanding officer, Brigadier General Beltson, stating that his duplicative claims for travel and lodging on the TDY and PCS vouchers were "inadvertent."

15. On January 29, 1986, Col. Crumpton committed suicide at his quarters by hanging himself. His body was discovered by his 12 year-old daughter, Jennifer, and a young friend. These facts were reported in several newspapers printed shortly after Col. Crumpton's death. These releases to news reporters were not made pursuant to FOIA requests and are not to be confused with later releases of information which form the basis for this litigation.

16. At the time of Col. Crumpton's death, the CID Report of Investigation (ROI) of travel fraud and other misconduct had not yet been completed.

17. Col. Crumpton's death gave rise to a substantial amount of media and congressional interest as well as speculation since it concerned a high-ranking military officer engaged in weapons research and development at an important military installation.

18. As stated in Finding of Fact No. 10, the CID also conducted an investigation into Col. Crumpton's death. This duty was assigned to Special Agent Charles E. Humphrey.

19. The ROI into Col. Crumpton's death included detailed descriptions and photographs of the death scene, the body of the deceased and the autopsy. Also included were interviews of witnesses, including Mrs. Crumpton, and hers and her daughter's reactions to the death and actions taken when the body was discovered.

20. The CID investigation into the fraud allegations continued after his death despite the fact that no action could be taken against Col. Crumpton. This was because of a lingering suspicion that further investigation might bring to light matters more serious than those already disclosed.

21. The ROI for fraud was finally completed on March 12, 1986. It concluded that Col. Crumpton had engaged in misconduct by submitting false travel claims, by accepting gratuities from contractors and by authorizing and using ostensibly official travel to defray expenses for personal reasons.

22. This ROI included references, in summaries of witness interviews, to allegations that the Crumptons had received an oil painting as a gift and that Mrs. Crumpton had allegedly made some comment about the "padding" of expenses for local travel. Included as attachments to the summary report were the statements of witnesses, as well as the statements of the Crumptons of December 10, 1985, and Richard Barrett's memorandum concerning the AMC-OIG inquiry.

C. The Releases Pursuant to FOIA Request

23. On January 27, 1986, two days before Crumpton's death, Phil Garber of the Morristown (NJ) Daily Record made a FOIA request for a copy of the CID ROI for fraud. He was originally told that the information requested could not be supplied because the fraud investigation was still continuing. Garber later amended his January 27, 1986 request to include the ROI of death as well as the ROI for fraud. He was given a redacted copy of the ROI of death in a response from CID dated April 28, 1986.

24. On February 18, 1986, Lawrence Ragonese, a reporter for the Newark Star Ledger, made a FOIA request for both the ROI for fraud and the ROI of death. In response, the CID on April 29, 1986, provided redacted copies of the ROI for fraud and the ROI of death.

25. On May 21, 1986, the CID provided Joseph Fisher, also a reporter for the Morristown Daily Record, with redacted copies of both ROI reports in response to his FOIA request. The same material was redacted from each of the copies of the ROIs concerning Col. Crumpton that were provided to the reporters pursuant to FOIA request.

26. The Report of Inquiry that was prepared by Colonel Barrett of the AMC Inspector General's Office was included as an exhibit to the CID ROI for fraud. Because of this, the CID did not release this portion of the ROI for fraud directly but referred it to the IG's office for review and direct response. By responses dated May 16,

1986 and June 6, 1986, respectively, the IG provided redacted copies of the AMC-IG Report of Inquiry to Ragonese and Fisher.

27. Jeffrey Porter, a civilian employee of the CID was given the responsibility of performing the initial review of the ROIs for fraud and of death sought by the media requesters and to recommend the extent to which that material should be released.

28. Prior to making his recommendations for release, Porter referred the ROI for fraud to the CID's Economic Crimes Division for a "Quality Assurance" review. The Quality Assurance Review was performed by Special Agent Bobby T. Kelly. Based on his review of the ROI for fraud, Kelly concluded that it was reasonably accurate, thorough and complete.

29. After Porter's review, his recommendations were reviewed by two of his superiors, Attorney Theodore Littlewood and Col. Richard Russell, the Staff Judge Advocate for the CID. It was Russell's role, as technical advisor to the commanding general, to make the legal determinations as to whether the requested documents should be released.

30. In making his recommendations for release, Porter assessed the public interest in the requested material which referenced Mrs. Crumpton or implicated the privacy interests of Col. Crumpton's family. He gave significant weight to the public's interest in information about persons, particularly a military commander in a senior leadership position. He also considered the public to

have an interest in information showing that every allegation concerning the conduct of an official such as Col. Crumpton had been explored.

31. In this request, he concluded that Mrs. Crumpton's sworn statement, including references to such matters as the oil painting, her accompanying her husband on contractor-funded weekend vacations, and the alleged use of travel funds for entertainment, were not sufficiently private to outweigh the public's interest in knowing that every allegation concerning possible misconduct by Col. Crumpton had been investigated.

32. With respect to portions of the ROI of death, Porter acknowledged that they contained information "painful" to surviving family members, but concluded that the applicable privacy interests to be outweighed by the public's interest in knowing that the investigatory finding of suicide was supported.

33. On the other hand, Porter regarded some of the privacy interests of plaintiff to outweigh any legitimate public interest in disclosure and accordingly withheld certain information given Agent Humphrey concerning plaintiff's observations of and communications with her husband prior to his death, the childrens' reactions upon discovery of his body, Crumpton's suicide note, portions of the autopsy report, as well as photos of the body, death scene and autopsy.

34. Porter did not consider the release of the requested information to be prohibited from disclosure because of the Privacy Act. He considered this Act not to apply because Col. Crumpton was dead and because the requested records were not filed in any system of records

from which they were retrievable by the name or personal identifier of the plaintiff.

35. After conducting his own independent review and assessing the public interest in the criminal investigation, Col. Russell concurred in Porter's recommendations regarding the release of the requested information. Russell, like Porter, did not regard the prohibitions of the Privacy Act as applicable to the facts of this case.

36. The information released in the CID Report for Fraud included plaintiff's sworn statement and references to her activities in the context of the allegations underlying the investigation.

37. The information released in the CID Report of Death included a portion of the autopsy report (the autopsy "protocol") and some description of Col. Crumpton's body and his wife's efforts to administer CPR.

38. The AMC-OIG report of inquiry was reviewed by Frederick Thaczuk, the Inspector General's Office Records Release officer. Thaczuk's recommendations were approved after review by several lawyers of authority.

39. After considering the privacy interests of Col. Crumpton's family and particularly those of plaintiff, Thaczuk recommended release of the AMC-OIG report with certain redactions, but without any redaction for references to the allegations concerning plaintiff's receipt of the oil painting, her comments about "local travel", and mention of alleged weekend trips at contractor expense.

40. Thereafter, in response to complaints and allegations made by plaintiff to the Secretary of the Army, a subsequent investigation into Younger's investigation for fraud was conducted by Colonel Elton Schauf. While Schauf found that Younger's ROI for fraud was "flawed" in certain respects, these "flaws" did not relate to any of the allegations concerning, or references to, plaintiff's alleged activities or statements.

41. On or about May 6, 1986, Mrs. Crumpton became aware that the Reports concerning her husband had been released to the press. Plaintiff offered evidence at trial that she was extremely emotionally upset when she learned of these releases and for a period of time withdrew from contact with other people.

42. On May 5, 1988, an administrative claim under the Federal Tort Claims Act was filed on plaintiff's behalf. On May 17, 1988, said claim was denied. On November 17, 1989, plaintiff filed her complaint in the present action. The original complaint has been twice amended.

CONCLUSIONS OF LAW

1. This Court has subject matter jurisdiction under 28 U.S.C. § 1346 (United States as defendant) and 28 U.S.C. §§ 2671 *et seq.* (actions for damages against the United States under the Federal Tort Claims Act).

2. This is not a case under the Privacy Act. The releases complained of are not covered by the Privacy Act because Col. Crumpton is deceased and because all of the records released were contained within systems of records retrievable in the name of plaintiff's husband or

by some identifying number, symbol or other identifying particular assigned to him. The Privacy Act and its prohibitions do not apply to any of the information released in this case.

3. This is not a suit under the Freedom of Information Act (FOIA) which is a disclosure statute containing several exemptions from mandated disclosure, specifically Exemptions 6, 7(C) and 7(D).

4. Rather, this is a suit under the FTCA in which plaintiff claims that the release under FOIA of certain information was improper and caused her severe emotional distress. Under the FTCA, the government waives its sovereign immunity from suit in tort for money damages.

5. This waiver of immunity is subject to several exceptions, two of which are relevant to the FOIA releases which are the basis of the wrongs alleged by plaintiff.

6. The FTCA provides in pertinent part, at 28 U.S.C. § 2680 that:

> the provisions of [the FTCA] . . . shall not apply to –
>
> (a) Any claim based upon an act of omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused. (emphasis supplied).

This section encompasses two exceptions to the FTCA: the due care exception and the discretionary function exception.

7. The "discretionary function" exception excepts from the coverage of the FTCA alleged tortious conduct arising from the performance or nonperformance of a governmental function involving the exercise of judgment, or from execution of a decision involving a permissible element of judgment or choice.

A. The "Due Care" Exception

8. The "due care" exception applies where the allegedly tortious conduct is comprised of a government employee's act or omission occurring in the course of executing statutory or regulatory provisions, where "due care" has been exercised by the employee.

9. The testimony and other evidence adduced at trial of this matter establishes that the releases of information on which plaintiff bases her action occurred in the context of the efforts of various employees of the Department of the Army to fulfill their statutory and regulatory duties under the FOIA. This evidence establishes that the Reports of Investigation at issue were released, in partially redacted form, after careful and time consuming review and consideration by persons responsible for processing FOIA requests to the CID and the Inspector General's Office. Consideration was given to the question of whether withholding of requested material was justified on the basis of the statutory exemptions from mandatory FOIA release, specifically including the exemptions pertaining to material which would if disclosed represent an

unwarranted or "clearly unwarranted" invasion of personal privacy. The privacy interests of plaintiff in the requested material were specifically assessed and considered. The evidence further establishes that in each case the recommendations as to what should be released and what withheld under FOIA exemptions underwent several layers of review before any final release determination was made.

10. The releases to which plaintiff objects were clearly made in the context of an agency's fulfillment of its statutory duties to respond to requests under the FOIA, and that the involved employees exercised due care in the manner in which the requests were processed and the release determinations made. Accordingly, plaintiff's claim falls within the "due care" exception from the FTCA, and the defendant has sovereign immunity from this suit for damages.

B. The "Discretionary Function" Exception

11. We also conclude that the "discretionary function" exception from the FTCA also applies to the undisputed facts of this case. The factual record is clear that the government employees who were responsible for recommending and determining the extent of the release of the investigative reports at issue used their judgment in assessing where and whether personal privacy interests of the plaintiff were involved in the potential release of particular information. They were also involved in balancing the public interest which they judged to be associated with disclosure of information against the private interests in withholding (that is, at least where interests

in personal privacy were considered to exist). We again hold that this assessment of personal privacy, as well as the balancing of public interest against such personal interests, was an inherently judgmental and discretionary task well within the meaning of the FTCA's discretionary function exception.

12. The involved federal employees had the statutory responsibility to use their judgment in making essentially subjective assessments of the nature and magnitude of the interests associated with release versus non-disclosure of the requested information. The determination of whether the FOIA's (b)(6) and (b)(7)(C) exemptions apply to any particular material plainly involves an element of judgment or choice in deciding whether personal privacy is indeed at issue and whether intrusion on that privacy may be "unwarranted".

13. The decision of whether to release matter notwithstanding its exempt status is a matter of agency discretion. This makes applicable the "discretionary function" exception which like the "due care" exception also deprives this Court of jurisdiction over plaintiff's FTCA claim.

An order consistent with the foregoing has been entered this day.

JOHN H. PRATT

United States District Judge

Date: February 14, 1994

ORDER

Consistent with the Findings of Fact and Conclusions of Law entered this day, it is by the Court this 14th day of February, 1994, hereby

ORDERED that judgment be entered in favor of defendants; and it is

ORDERED that each side shall bear its own costs; and it is

ORDERED that the above action is dismissed with prejudice.

JOHN H. PRATT

FILED
Oct. 4, 1995

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5056 September Term, 1995

Case No. 89-CV-03128

Madolyn L. Crumpton,

Appellant;

versus

Michael P. W. Stone,
Secretary of the Army, et al.,

Appellees.

BEFORE: Sentelle, Henderson and Tatel,
Circuit Judges

ORDER

Upon consideration of Appellant's Petition for Rehearing filed September 11, 1995, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Linda Jones
Linda Jones
Deputy Clerk

FILED
Oct. 4, 1995

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5056 September Term, 1995

Case No. 89-CV-03128

Madolyn L. Crumpton,

Appellant;

versus

Michael P. W. Stone,
Secretary of the Army, et al.,

Appellees.

BEFORE: Edwards, Chief Judge, Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, and Tatel, Circuit Judges.

ORDER

Upon consideration of Appellant's Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Linda Jones
Linda Jones
Deputy Clerk

FILED
Sept. 14, 1995

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5056 September Term, 1994

Madolyn L. Crumpton,

Appellant;

versus

Michael P. W. Stone,
Secretary of the Army, et al.,

Appellees.

BEFORE: Sentelle, Henderson, and Tatel, Circuit Judges.

ORDER

Upon consideration of appellant's response to the court's order of July 28, 1995, it is

ORDERED, by the Court, that the order of June 2, 1995 is modified so that only the *Report of Investigation of Death of COL Crumpton* and the exhibits thereto shall remain under seal.

This order applies to the entire record compiled before the District Court and before this court.

Appellant is directed to submit an original and six copies of volume II of the appendix from which the now

sealed material has been deleted. Appellee is directed to submit an original and nine copies of its brief from which the now sealed material has been deleted. These submissions shall be filed within thirty days of the date of this order and shall be clearly marked as "Public Copy".

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk